SUPREME COURT, U. S.
FILED
MAR 7 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-902

JAMES AND ARTIE MITCHELL,
Petitioners,

vs.

RICHARD D. HONGISTO, Sheriff,
City and County of San Francisco,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Party in Interest.

Response in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

Copies of the opinions herein of the United States District Court for the Northern District of California dated January 8, 1974, and of the United States Court of Appeals for the Ninth Circuit dated August 21, 1975, are attached to the Petition and marked "Appendix".

JURISDICTION

Petitioners assert that jurisdiction of this Court exists pursuant to Title 28, United States Code section 1254(1).

QUESTIONS PRESENTED

1. Whether California Penal Code section 311.2 as written or construed meets the constitutional requirements of specificity set forth in *Miller v. California*, 413 U.S. 15 (1973).

2. Whether, if the *Miller* test is not applied to a conviction in 1971, petitioners were convicted in violation of the due process clause of the Fourteenth Amendment in that there was no evidence to establish the essential elements of obscenity.

STATEMENT OF THE FACTS

On March 2, 1971, petitioners, James Mitchell and Artie Mitchell were convicted in the Municipal Court of San Francisco of violation of section 311.2 of the Penal Code of the State of California which proscribes the exhibition of obscene matter. Petitioner James Mitchell was sentenced to a term of six months in the county jail. Petitioner Artie Mitchell was sentenced to a term of four months. In addition, each petitioner was fined one thousand dollars.

On February 1, 1972, the Appellate Department of the Superior Court of the State of California in and for the City and County of San Francisco affirmed the judgment. A Petition for Rehearing or Alternatively for Certification to the Court of Appeal was denied on February 15, 1972. A Petition for Writ of Habeas Corpus to the Court of Appeal of the State of California, First Appellate District, was denied on April 7, 1972. On May 4, 1972, a Petition for Hearing was denied by the California Supreme Court.

On October 25, 1972, a Petition for Writ of Habeas Corpus was filed in the United States District Court for the Northern District of California. The petition was dismissed on November 7, 1972. The District Court, however, certified that probable cause for appeal existed. Appeal was taken

to the United States Court of Appeals for the Ninth Circuit, and, on July 17, 1973, the matter was remanded to the District Court on stipulation of the parties.

On January 9, 1974, an order was filed in the District Court by which the Petition for Writ of Habeas Corpus was denied. An appeal to the United States Court of Appeals for the Ninth Circuit followed. On August 21, 1975, an order was filed in that Court by which the judgment was affirmed.

ARGUMENT

I. The California Obscenity Statute as Authoritatively Construed by California Courts Is Neither Unconstitutionally Vague Nor Overbroad.

A.

In *Miller v. California*, 413 U.S. 15 (1973), this Court established new guidelines for the regulation of obscenity by the state and federal governments. Significantly, however, this Court did *not* invalidate the California statutes involved in *Miller*, but, rather, remanded the matter to state courts for reinterpretation of these statutes in light of the new definitions of obscenity set forth in that opinion. In so doing, this Court stated that valid obscenity regulations must specifically define the conduct proscribed "by the applicable state law as written *or authoritatively construed*." *Miller v. California*, *supra*, at p. 24. Indeed this passage is followed by a footnote which states: "We do not hold, as Mr. Justice Brennan intimates, that all states other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereinafter, may well be adequate." *Miller v. California*, *supra*, 413 U.S., at p. 24, fn. 6.

To the same effect, this Court stated in *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973):

> "In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theater I or II provided that the applicable Georgia law, as written *or authoritatively interpreted by the Georgia courts,* meets the First Amendment standard set forth in *Miller v. California, supra,* 413 U.S., at 23-25, 37 L.Ed.2d at 431." *Id.* at p. 69.

Speaking on the same subject in the companion case of *United States v. 12 Two Hundred Foot Reels,* 413 U.S. 123 (1973), this Court construed federal statutes relating to obscenity in accordance with the *Miller* decision noting "while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes. . . ." *Id.* at p. 130, fn. 7.

Thus, this Court continues to recognize the propriety of state courts authoritatively construing their state's statutes relating to obscenity as well as other First Amendment areas so that those statutes fall within constitutional guidelines. Interpretations of state statutes by state courts have the same effect as amendments to those statutes by the state legislature. *Cramp v. Board of Public Instruction,* 368 U.S. 278, 285 (1961). See also *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 369 (1971); *United States v. Reidel,* 402 U.S. 351, 356-357 (1971); *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 687-688 (1959); *Winters v. New York,* 333 U.S. 507 (1948).

B.

California Penal Code section 311 defines obscene matter as follows:

> "[a] 'Obscene matter' means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient inter-

> est, *i.e.*, a shameful or morbid interest in nudity, sex or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in the description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance."

Enacted in 1961, and unchanged in its material parts since, Penal Code section 311 is derived from the language of this Court in *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). In *Miller v. California*, 413 U.S. 15 (1973), however, this Court announced a new definition of obscenity as follows:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,
>
> "(b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
>
> "(c) whether the work, taken as a whole lacks serious literary, artistic, political, or scientific value." *Id.* at p. 24.

This Court also defined in *Miller* the type of conduct which may be forbidden by state laws under part (b) of the above test as:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.* at p. 25.

Thus, the *Miller* definition of obscenity differs in only two ways from the *Roth/Memoirs* definition and the definition in the California Penal Code. First, the words "utterly

without redeeming social value or importance" have been replaced by the phrase, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Second, part (b), or the portion of the *Memoirs'* definition which deals with "patently offensive" material, has been replaced by the phrase which sets as the standard, "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law."

The first element of California Penal Code section 311—that the predominant appeal of the matter to the average person, applying contemporary standards, is to the prurient interest—is identical to the first of the three *Miller* requirements set forth above. The question therefore presented is whether the statute, as written or construed, meets the requirements of parts (b) and (c) of the *Miller* standard.

C.

By requiring that the matter must go "substantially beyond customary limits of candor in description or representation of such matters", California Penal Code section 311 is substantially the same as the *Miller* formulation (b) set forth above. It is true, of course, that part (b) of the standard set out in *Miller* requires that these matters must be "specifically defined by applicable state law." We submit, however, that California cases have authoritatively construed this statute and have so limited it.

In *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 31 Cal.Rptr. 800 (1963), the California Supreme Court stated:

> "In substance these courts, applying the rulings of the United States Supreme Court, hold that if material is commercial obscenity or saleable pornography it is obscenity in the sense that it is utterly without redeeming social importance; it is hard-core pornography; as such it lies outside the protective embrace of the First Amendment. If the material, however, has literary value, if it is a serious work of literature or art, then

> it possesses redeeming social importance and obtains the benefit of constitutional guarantees." *Id.* at p. 918.

Moreover, the court stated:

> "By employing the term 'utterly' the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was *totally* devoid of social importance. The only material that falls into the latter category is hard-core pornography." *Id.* at p. 920.

Thus, it is plainly recognized in California law that the only material which may be prosecuted as obscene is "hard-core pornography"; that is to say, material which is "utterly without redeeming social importance."

Moreover, the material must be "designed to stimulate sexual feelings and act as an aphrodisiac." This must be the dominant theme of the matter "taken as a whole". *In re Van Geldern*, 14 Cal.App.3d 838, 843, 92 Cal.Rptr. 592 (1971); *Dixon v. Municipal Court*, 267 Cal.App.2d 789, 73 Cal.Rptr. 587 (1968) [disapproved on other grounds in *Barrows v. Municipal Court*, 1 Cal.3d 821, 83 Cal.Rptr. 819 (1970).] Further, it is settled law in California that in order to be regarded obscene, the matter must contain a *graphic depiction of sexual activity*, and must appeal to a prurient interest in sex. Accordingly, the representation of the nude human form in a nonsexual context does not offend Penal Code section 311 *et seq. People v. Noroff*, 67 Cal.2d 791, 63 Cal.Rptr. 575 (1967) ["nudist magazine" held not obscene]. See also *In re Panchot*, 70 Cal.2d 105, 73 Cal.Rptr. 689 (1968) [photographs depicting nudity held not obscene]; *In re Giannini*, 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968) [nude dancing by live performer held not obscene]; *People v. Rosakos*, 268 Cal.App.2d 497, 74 Cal.Rptr. 34 (1968) [photographs depicting nudity held not obscene].

The purpose of specificity is to afford the potential defendant with notice of that for which he may be held accountable by clarifying the perimeters of the proscribed conduct. We submit, however, that *Miller's* demand for specificity does not require a detailed statutory enumeration and description of all of the types of sexual activity sought to be proscribed as obscene. Rather, this Court concluded in *Miller* that obscenity statutes may be upheld, despite "the inability to define regulated materials with ultimate, god-like precision. . . ." *Id.* at p. 28. Nor is such detail required under the holding of *Roth v. United States, supra,* 354 U.S. at p. 491.

Furthermore, we submit that it is not required that in order to avert the constitutional infirmity of vagueness the statute must recite a detailed "blueprint" of the proscribed conduct. In *People v. Noroff, supra,* the California Supreme Court stated:

> "The graphic depiction of such sexual activity seems to be the distinguishing feature of the only materials which the United States Supreme Court has ever ruled obscene. The publications involved in *Ginzberg v. United States, supra,* 383 U.S. 463, contained descriptions and photographic essays dealing explicitly and dynamically with sexual relations; the court noted that the petitioners were guilty of '*animating* sensual detail to give the publication a salacious cast. . . .' (Italics added.) (*Id.* at p. 471 [16 L.Ed.2d at p. 38].) The materials at issue in *Mishkin v. New York* (1966) 383 U.S. 502 [16 L.Ed.2d 56, 86 S.Ct. 958], portrayed 'sexuality in many guises. Some depict[ed] relatively normal heterosexual relations, but more depict[ed] such deviations as sado-masochism, fetishism, and homosexuality. Many [had] covers with drawings of scantily clad women being whipped, beaten, tortured, or abused. . . .' (*Id.*, at p. 505 [16 L.Ed.2d at p. 60].) Finally, the film central to the litigation in *Landau v.*

> *Fording, supra,* 387 U.S. 456, 'explicitly and vividly revealed acts of masturbation, oral copulation . . . sadism, masochism and sex' (245 Cal.App.2d 820, 822, affd. *per curiam,* 387 U.S. 456). Such materials, and no others, have been thought to constitute 'hard core pornography.' " (Emphasis added.) *Id.* at p. 794, n. 6.

This definition of the term "hard-core pornography", we submit, refutes petitioner's contention that the term "hard-core" is insufficiently precise. This view has been adopted by California courts. In *People v. Enskat,* 33 Cal.App.3d 900, 109 Cal.Rptr. 433 (1973), the California Court of Appeal, Division Five, concluded that previous California cases had limited Penal Code section 311 within the formulation set forth in *Miller.* More recently, the California Supreme Court adopted the *Enskat* conclusion in *Bloom v. Municipal Court,* ..... Cal.3d ....., ... Cal.Rptr. ..... [L.A. 30258, filed February 6, 1976]. In *Bloom* the court stated:

> "Having previously denied hearing in *Enskat,* we now expressly approve that decision. Section 311 has been and is to be limited to patently offensive representations or descriptions of the specific 'hard core' sexual conduct given as examples in *Miller I,* i.e., 'ultimate sexual acts, normal or perverted, actual or simulated,' and 'masturbation, excretory functions, and lewd exhibitions of the genitals.' (413 U.S. at p. 25.) As so construed, the statute is not unconstitutionally vague." (*Slip opn.* at p. 18.)

Finally, we submit that the Court of Appeals correctly relied on *Hicks v. Miranda,* ..... U.S. ....., 95 S.Ct. 2281 (1975), in the case at bar. It is to be recalled that in *Hicks* this Court observed:

> "[T]he District Court was in error in holding that it could disregard the decision in *Miller II.* That case was an appeal from a decision by a state court up-

> holding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under § 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We are not obliged to grant the case plenary consideration, and we did not; but we were required to deal with the merits. *We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one.*" (Emphasis added.) *Hicks v. Miranda, supra,* ..... U.S. ....., 95 S.Ct. at p. 2289.

As the statute involved in *Miller II* was the same statute as that challenged by petitioners herein, we submit that the Court of Appeals correctly interpreted *Hicks* as a decision by this Court which is squarely in point, and one in which petitioners' challenge was rejected.

We therefore submit that petitioners' contention has been rejected by state and federal courts and should be disregarded.

II. Adequate Evidence Was Presented on All Essential Elements of the Crime.

Petitioners next contend that, as the only evidence presented by the prosecution was the film itself[1] and the testimony of Sergeant Sol Weiner of the San Francisco Police Department, there was insufficient evidence on essential elements of violation of California Penal Code section 311. In summary, petitioners urge that expert testimony was required on the issues of contemporary standards, customary limits of candor and redeeming social value.

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1. The film in question was entitled "Glowy Flesh".

At the outset it should be recognized that petitioners' reliance on *In re Giannini,* 69 Cal.2d 563, 72 Cal.Rptr. 655 (1968), for the proposition that such expert testimony is required is unavailing. In 1969, the year following *Giannini,* the California Legislature enacted California Penal Code section 312.1 which provides in pertinent part:

> "In any prosecution for a violation of the provisions of this chapter or of Chapter 7.6 (commencing with Section 313), neither the prosecution nor the defense shall be required to introduce expert witness testimony concerning the obscene or harmful character of the matter or live conduct which is the subject of any such prosecution."

As observed by the California Court of Appeal in *People v. Enskat, supra,* 33 Cal.App.3d 900 (1973), "Further, section 312.1 was adopted by the Legislature after the *Giannini* decision. The section in effect repeals *Giannini* (see *In re Price,* 4 Cal.App.3d 941, 948 [Thompson, J., dissenting])". *Id.* at p. 914. Moreover, in *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973), this Court concluded that it was not error to fail to require expert evidence on the question of obscenity where, as here, the materials themselves are placed in evidence. In revealing this conclusion this Court observed: "The films, obviously, are the best evidence of what they represent." *Id.* at p. 56.

In the instant case the District Court found that:

> ". . . Sergeant Sol Weiner of the San Francisco Police Department testified as to the elements of predominant appeal to the prurient interest and content substantially exceeding customary statewide limits of candor. Such evidence is constitutionally sufficient proof for all three elements—the only relevant inquiry in this proceeding."

This finding, we submit, constitutes sufficient response to petitioner's contention. Officer Weiner's testimony, together with the film itself, presented to the jury sufficient evidence on each element of the crime consistent with both California law and federal constitutional requirements.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

DATED: March 6, 1976

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